

Supreme Court of the
UNITED STATES
SEP 15 1989
JOSEPH P. TIGHE, JR.
CLERK

No. 89-315

In The
Supreme Court of the United States
October Term, 1989

MICHAEL S. ROBERTSON,

Petitioner,

v.

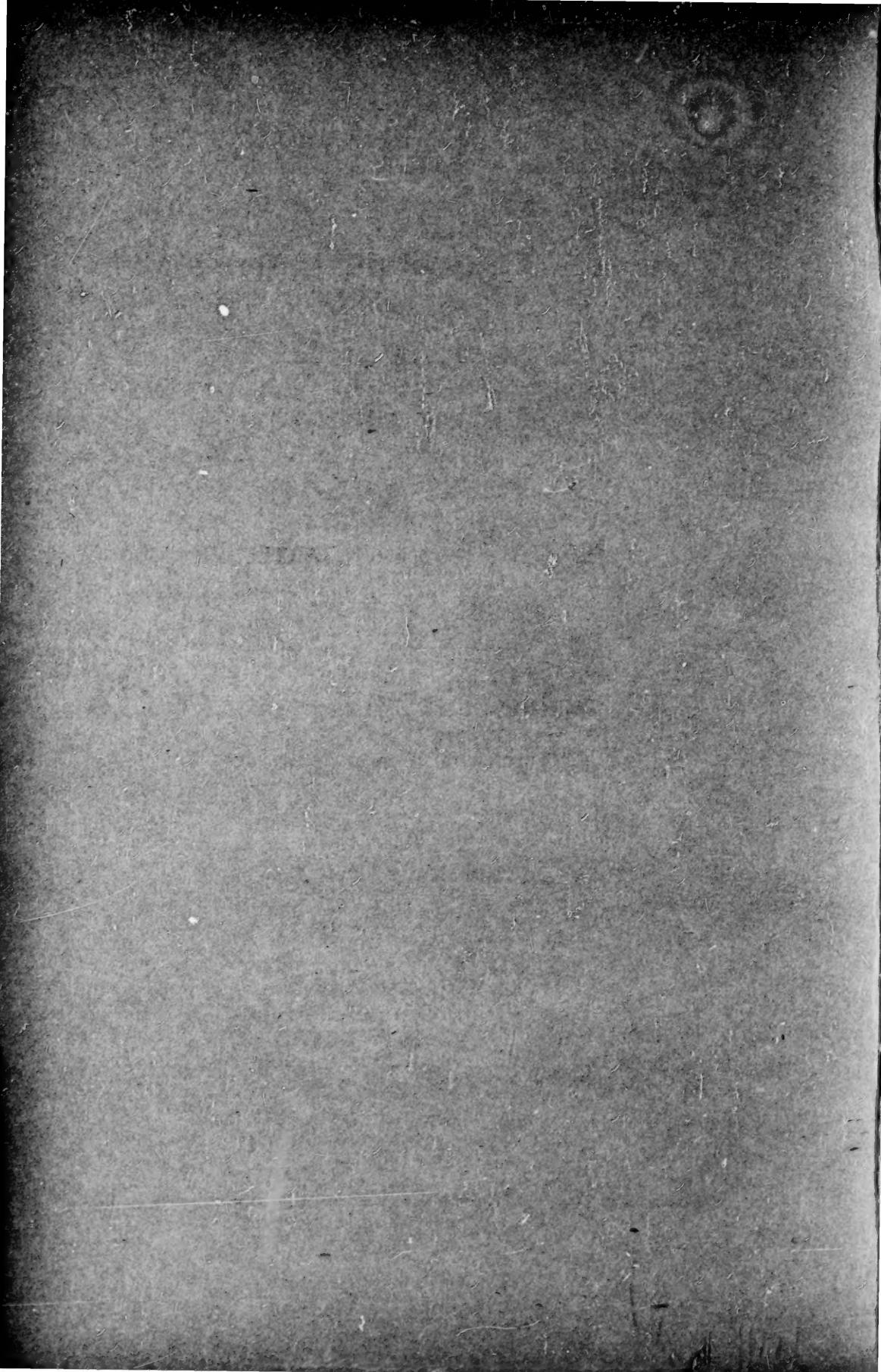
GASTON SNOW & ELY BARTLETT,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of the
Commonwealth of Massachusetts

BRIEF IN OPPOSITION

RICHARD W. RENEHAN,
Counsel of Record
CHARLES R. DOUGHERTY
WILLIAM B. FORBUSH
HILL & BARLOW
One International Place
Boston, MA 02110
(617) 439-3555



QUESTION PRESENTED

In an action for legal malpractice and misrepresentation which was re-tried by stipulation without a jury on the written record of the first trial, was there a *per se* violation of the Due Process Clause of the Fourteenth Amendment entitling the plaintiff to a third trial, when (a) after finding for the defendant in the re-trial, the state court granted plaintiff's request for final argument and again found for the defendant and (b) on appeal the plaintiff requested and received a *de novo* review of the record by the state's highest court, which found for the defendant?

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-JURISDICTION

The Petitioner asserts jurisdiction under 28 U.S.C. § 1257(a).¹ As described below, however, the state court of last resort did not reach the federal question presented in the Petition. The state court instead affirmed on an alternative ground by making findings of fact under state law, based upon a *de novo* review of the written record which Petitioner had requested. Accordingly, the Petition should be denied for lack of jurisdiction, in addition to the other grounds described below.

STATEMENT OF CASE

In 1982, Petitioner Michael S. Robertson commenced a civil action against Respondent Gaston Snow & Ely Bartlett, a law firm, in Suffolk Superior Court of the Commonwealth of Massachusetts. (App. 1-2.) The Petitioner asserted claims of (1) legal malpractice, (2) tortious misrepresentation and nondisclosure, and (3) a violation of the state's unfair trade practices statute, M.G.L. c. 93A. (App. 2.) The case turned upon the question whether an attorney-client relationship existed between the Petitioner and the Respondent under Massachusetts law. (App. 6-13, 16-24.)

A jury found that an attorney-client relationship existed and returned a verdict for the Petitioner on the counts of legal malpractice and misrepresentation/non-disclosure. (App. 2-3.) On the chapter 93A count tried to

¹ The Petition incorrectly cites to the similar predecessor provision, 28 U.S.C. § 1257(3).

the court, however, the judge found that no attorney-client relationship existed and issued a decision for the Respondent. (App. 3.) In the exercise of its discretion, the trial court ordered a new trial on the counts which had been submitted to the jury. (App. 3-4, 13-14.)

By stipulation of the parties, the second trial was conducted without a jury before a different judge based on the written record of the first trial. (App. 4 & n.2, 31.) The trial court reviewed the entire transcript from the first trial, which included both parties' final arguments; the exhibits; certain stipulations; and one additional exhibit. (App. 4, 31-32.) On the basis of this record, the judge found in favor of the Respondent. (App. 4.)

Petitioner filed a motion for a third trial "or other appropriate relief," including a request for argument, based in part on the fact that the trial court issued its decision without hearing final oral argument from the Petitioner in the second trial. (App. 4.) The trial court scheduled and conducted a hearing at which both parties presented final arguments and at which the Petitioner submitted requests for further findings. (App. 4-5.) On the basis of the written record and these final arguments, the court again found for the Respondent. (App. 5, 31-32, 33-34.)

On appeal to the Supreme Judicial Court of the Commonwealth of Massachusetts, the Petitioner argued, *inter alia*, that (a) since the evidence at the second trial was entirely documentary, the Supreme Judicial Court should conduct a *de novo* review of the record and find for the Petitioner, and (b) a third trial on the written record

should be ordered since the trial court did not hear final argument before it issued its initial decision. (App. 5-6.)

After dispensing with two other issues (App. 13-24, 29), the Supreme Judicial Court conducted a *de novo* review of the written record which the parties had agreed to submit as the basis for the second trial. (App. 25-26 & n.7, 30.) Based upon this *de novo* review, the Supreme Judicial Court held, under Massachusetts law, that no attorney-client relationship existed between the Petitioner and the Respondent and that the Petitioner did not sustain his burden of proof on the misrepresentation/nondisclosure claim. (App. 26-28.)

The Supreme Judicial Court explicitly did not reach the question whether the second trial court deprived the Petitioner of due process in a manner requiring a new trial on the written record before a third Superior Court judge. (App. 26 n.7, 30.) Instead, the Supreme Judicial Court held that such a decision was unnecessary because, regardless of the merits of the constitutional claim, its *de novo* review of the written record in effect constituted the third trial which the Petitioner had requested. (App. 26 n.7, 30.)

The Petitioner filed a petition for rehearing "refocus[ing]" its authorities (Petition for Writ of Certiorari at 10), claiming a *per se* constitutional error (App. 35-40), disagreeing with the Supreme Judicial Court's findings of fact based upon the written record (App. 41-53), and demanding another *de novo* trial based upon the same written record before another state trial judge (App. 36, 38 n.1.) The Supreme Judicial Court denied the petition for rehearing.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied. By stipulation, this state tort action was re-tried on the written record of the first trial. On appeal, the Petitioner asserted a due process violation by the trial court and demanded a *de novo* review of the written record by the state's highest court. Without reaching the due process question, the state supreme court granted the Petitioner the process which it demanded. That the Petitioner is unhappy with the findings of fact under state law resulting from that process does not afford grounds for granting a writ of certiorari. See 28 U.S.C. § 1257(a); S. Ct. R. 17.1(b), (c).

Even if the state's highest court had not conducted a *de novo* review, there was no violation of due process. The record which the parties agreed to submit to the second trial court as the sole basis for decision included a transcript of the final argument made by the Petitioner in the first trial. When the Petitioner requested final argument after issuance of the initial decision in the second trial, the trial court heard both parties and received requests for additional findings from the Petitioner. These circumstances do not constitute a *per se* violation of the Due Process Clause requiring a third trial under any of the authorities cited by the Petitioner.

ARGUMENT

A. Without Reaching the Federal Question, the Supreme Judicial Court Made Findings of Fact Based Upon A *De Novo* Review, As the Petitioner Requested.

On appeal, the Petitioner asserted a due process violation by the trial court and demanded a *de novo* review and a third trial on the written record. (App. 5-6.) The Supreme Judicial Court of Massachusetts granted the Petitioner's request that it conduct a *de novo* review of the written record, which the parties had stipulated would be the basis for decision. (App. 4-5, 25-26 & n.7, 30.) The state's highest court then made factual findings and reached legal conclusions under Massachusetts law based upon that record. (App. 24-28.) Specifically, the court held that no attorney-client relationship existed between the Petitioner and the Respondent and that the Petitioner failed to meet his burden of proof on the misrepresentation/nondisclosure claim. (App. 26-28.) Accordingly, the Supreme Judicial Court affirmed the judgment for the Respondent. (App. 30.)

The Supreme Judicial Court expressly stated in its opinion that it did not reach the federal constitutional question whether the trial court erred in receiving final oral argument after issuing its initial decision. (App. 26 n.7, 30.) Regardless of the merits of the claim of constitutional error, the court's *de novo* review of the written record in effect gave the Petitioner the third trial on the

written record which he had demanded.² (*Id.*) The court then issued its judgment based upon its findings of fact under state law. (App. 6-13, 24-30.)

As evidenced by the Petitioner's concededly "immaterial" complaints about "aberr[ant]" and "skewed" findings of fact by the Supreme Judicial Court of Massachusetts (*see* 28 U.S.C. § 1257(a); Petition for Writ of Certiorari at 11 n.5), the Petitioner is merely unhappy with the results of the *de novo* review which he requested and received. This Petition belies a fanciful hope that a state trial judge in a third trial on the written record would reach a different conclusion than was reached by five Justices of the state's highest court on that same record.

Because the state court of last resort granted the Petitioner the *de novo* review he requested and based its decision upon findings of fact under state law, the Petition for a Writ of Certiorari should be denied. Either jurisdiction is altogether lacking to entertain a writ of certiorari to review the state court's decision which is plainly based upon findings of fact under state law, *see*

² The Petitioner had demanded a third trial on the record before another judge of the Suffolk Superior Court. (*See* App. 5-6, 36, 38 n.1.) The Respondent submits that considerations of fundamental fairness embodied in the Due Process Clause do not require that the Petitioner receive a *de novo* review of the written record by a state trial court judge instead of the *de novo* review which he in fact received from five Justices of the state's highest court. (App. 1.)

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (adequate and independent state ground precludes review); *see also Harris v. Reed*, 109 S. Ct. 1038, 1042 (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935); *Utley v. St. Petersburg*, 292 U.S. 106, 111-12 (1934); 28 U.S.C. § 1257(a), or no "special and important reasons" exist for a discretionary grant of a writ of certiorari to review the decision in this state tort action in which the state court of last resort has not "decided a federal question" in conflict with decisions of this Court or other jurisdictions, *see S. Ct. R.* 17.1(b), (c).

B. The Trial Court's Actions Did Not Constitute a Per Se Violation of the Due Process Clause Requiring a Third Trial.

Even if the Supreme Judicial Court had not conducted a *de novo* review, there was no *per se* violation of due process. The Petitioner asserts that the trial judge violated his purported due process right to closing argument in the jury-waived retrial on a written record. The Petition, however, relies principally upon federal decisions addressing the Sixth Amendment right to counsel, *Herring v. New York*, 422 U.S. 853, 859 (1975) (prohibiting "total denial" of final argument in criminal proceeding); *Powell v. Alabama*, 287 U.S. 45 (1932); *United States v. Spears*, 671 F.2d 991 (7th Cir. 1982); *Patty v. Bordenkircher*, 603 F.2d 587 (6th Cir. 1979); *see also Spence v. State*, 463 A.2d 808 (Md. 1983); *Commonwealth v. Miranda*, 22 Mass. App. 10, 490 N.E.2d 1195 (1986), and upon certain decisions addressing a complete denial of a right to be heard in a civil case, *Hovey v. Elliot*, 167 U.S. 409 (1897); *Windsor*

v. McVeigh, 93 U.S. 274 (1896); *Pizer v. Hunt*, 253 Mass. 321, 148 N.E. 801 (1932).

Whatever constitutional right to final argument may exist in a civil jury-waived trial,³ it was not violated here. The parties stipulated that the re-trial would be submitted on the basis of the documentary record and entire transcript of the first trial (App. 4), which included both parties' final arguments. The second trial court reviewed the entire transcript as the basis for his decision. (App. 31-32.) After receiving the decision in favor of Respondent, the Petitioner moved for a new trial "or other appropriate relief" (App. 4), which included a request for argument. The trial court granted both parties an opportunity for final argument and solicited requests for further findings. (App. 4-5.) See *Herring*, 422 U.S. at 862 (acknowledging that trial courts have broad discretion in controlling duration and limiting content of final argument in criminal action); Mass. R. Civ. P. 51(a) (providing

³ The Petition fails to recognize the long line of cases holding that final oral argument in a non-jury civil case is not an absolute right, but a privilege to be exercised under the discretion of the trial court. *Peckham v. Family Loan Co.*, 262 F.2d 422, 425 (5th Cir.) (refusal to grant final oral argument at close of non-jury civil trial was not error), cert. denied, 361 U.S. 824 (1959); *Daru v. Martin*, 89 Ariz. 373, 363 P.2d 61 (1961); *Gillette v. Gillette*, 180 Cal. App.2d 777, 4 Cal. Rptr. 700, 703-04 (1960); *DeJohn v. American Estate Life Ins. Co.*, 489 P.2d 1065, 1066-67 (Colo. App. 1971); *Pozitzer v. W.R. Martin Co.*, 374 S.W.2d 194, 195 (Ky. 1963); *Fritts v. Fritts*, 11 Md. App. 195, 273 A.2d 648, 649-50 (1971); *Missouri Nat'l Life Ins. Co. v. Mead*, 393 P.2d 521, 524 (Okla. 1964); *Davis v. Dalles Lumber & Mfg. Co.*, 231 Or. 86, 371 P.2d 974, 974-75 (1962); *City of Corpus Christi v. Krause*, 584 S.W.2d 325, 330 (Tex. Civ. App. 1979).

that in jury trials the court may reasonably reduce or extend time for closing argument). The trial court then issued a final decision and entered judgment for the Respondent. (App. 31-32, 33-34.)

Accordingly, in this case, no total denial of final argument occurred. *See Woodbury v. Pflieger*, 309 N.W.2d 104, 107-08 (N.D. 1981) (conducting final oral argument after issuing initial decision in jury-waived civil trial did not violate due process); *see also id.* at 107 (noting that decisionmaking in bench trial may be enhanced when judge makes initial findings and then solicits argument from counsel). None of the authorities relied upon by the Petitioner dictates a different conclusion in this non-jury civil action tried on a written record. Therefore, even if the Supreme Judicial Court of Massachusetts had decided the federal question it did not reach (App. 26 n.7, 30), its judgment would not have been "in conflict" with decisions of other state courts of last resort, federal courts of appeals, or this Court. *See S. Ct. R. 17.1(b), (c).*

CONCLUSION

For the reasons stated above, the Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

RICHARD W. RENEHAN,
Counsel of Record
CHARLES R. DOUGHERTY
WILLIAM B. FORBUSH
HILL & BARLOW
One International Place
Boston, MA 02110
(617) 439-3555

Date: September 15, 1989

